



Department of Energy

Washington, DC 20585

FEB 21 2019

BY ELECTRONIC MAIL

Emma Best
MuckRock News
53571-80384283@requests.muckrock.com

Re: Case No. FIA-19-0003
Request No. 18-00182-DO

Dear Ms. Best:

The Department of Energy (DOE) has considered the Freedom of Information Act appeal (Appeal) that you filed on February 6, 2019. As the enclosed Decision and Order indicates, the DOE has determined that the Appeal, Case No. FIA-19-0003, be denied.

If you have any questions regarding this Decision and Order, please contact Phillip Harmonick, Attorney-Advisor, at the Office of Hearings and Appeals, by electronic mail message at Phillip.Harmonick@hq.doe.gov or by telephone at (202) 287-1594.

Sincerely,

A handwritten signature in blue ink, appearing to read "P. Marmolejos", is written over the word "Sincerely,".

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Enclosure



Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Emma Best)

Filing Date: February 6, 2019)

Case No.: FIA-19-0003)

Issued: FEB 21 2019

Decision and Order

On February 6, 2019, Ms. Emma Best (Appellant) appealed a determination letter issued by the United States Department of Energy's (DOE) National Nuclear Security Administration (NNSA) regarding Request No. 18-00182-DO. In that letter, the NNSA responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004. The NNSA provided records responsive to Appellant's request, however, the Appellant asserts that the NNSA's search was not reasonably calculated to include responsive online materials or information related to the creation of a mascot character (the Green Reaper) that is the subject of the Appellant's request. As explained below, we deny the Appeal.

I. Background

On May 9, 2018, Appellant submitted a FOIA request for "[r]ecords relating to the creation, design, approval and implementation of the Nevada National Security Site's mascot, the Green Reaper."

On January 16, 2019, the NNSA issued a response to Appellant's FOIA request, providing records concerning the approval and execution of the procurement of a Green Reaper costume, communications related to an award for the use of the character in sustainable communications, and several reports available to the public on DOE's Nevada National Security Site's website. Determination Letter from John E. Weckerle, Authorizing and Denying Official, NNSA, to Emma Best (January 16, 2019) (Determination Letter). In the Determination Letter, the NNSA observed that DOE's Nevada Field Office (NFO) had not found any responsive records, and that each of the records related to the approval and execution of the procurement of the costume was located by the management and operating (M&O) contractor for the Nevada National Security Site. *Id.* at 1.

On February 6, 2019, DOE's Office of Hearings and Appeals (OHA) received Appellant's appeal. Emma Best FOIA Appeal (February 6, 2019). In her appeal, Appellant asserts that the NNSA's search was not reasonably calculated to locate online records or records related to "the creation of the character itself – as opposed to the creation of the costume." *Id.* at 1.



II. Analysis

A. Adequacy of NNSA's Search

“Under the FOIA, an agency is obliged to make available to the public records that are reasonably described in a written request, if not exempt from disclosure.” *Kidder v. FBI*, 517 F. Supp. 2d 17, 23 (D.D.C. 2007); 5 U.S.C. §§ 552(a)(3)(A),(b). “A request reasonably describes records if the agency is able to determine precisely what records are being requested.” *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C.Cir.1997) (internal quotation marks and citation omitted).

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply “does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Ralph Sletager*, OHA Case No. FIA-14-0030 (2014).

Appellant’s appeal concerns two (2) types of records: online information related to the implementation of the Green Reaper character and records related to the creation of the character. As we explain below, the NNSA adequately searched for records concerning the creation of the character and was not obligated to provide Appellant with records readily available to the public on DOE webpages.

1. The NNSA’s Search was Reasonably Calculated to Uncover Responsive Records

The Appellant’s appeal asserts that the absence of records related to the creation of the character is evidence of the inadequacy of the NNSA’s search. An OHA staff attorney contacted the NNSA concerning how it had conducted its search for records related to the creation of the character. An individual employed at the NFO explained that the creator of the Green Reaper was formerly employed by the M&O contractor for the Nevada National Security Site, but had left her position there in 2015. Pursuant to the M&O contractor’s information technology policies, the M&O contractor discontinues storage of employees’ electronic data after a designated period of time following the employees’ separation from the M&O contractor’s employ. Since the M&O contractor no longer maintained the electronic records of the person who created the character, the M&O contractor searched shared drives on which the creator of the character might have stored records related to the creation of the character and instructed employees involved in the implementation of the character to manually search for records related to the creation of the character. These searches did not produce any records other than those already provided to the Appellant in the NNSA’s January 16, 2019, response to the Appellant’s FOIA request.

We find the NNSA’s search was reasonably calculated to uncover responsive records in light of the facts that approximately seven (7) years have elapsed since the creation of the character, the creator of the character is no longer employed by the M&O contractor, the M&O contractor no longer possesses any electronic records of the creator of the character that were not shared with other employees or stored in a shared drive, and none of the employees of the M&O contractor

currently involved in the implementation of the character were able to locate records related to the creation of the character.

2. NNSA Had No Obligation to Provide Links to Every Mention of the Green Reaper on DOE Webpages

The FOIA requires agencies to disclose records to the public, but does not compel agency employees to act as assistants to private actors in organizing publicly available information for their convenience. “[A]n agency ‘need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access,’ for example, making records available in a reading room.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 70 (D.C. Cir. 1990) (quoting *Tax Analysts v. DOJ*, 845 F.2d 1060 (D.C. Cir. 1988)). The Appellant’s ability to locate the record cited in her appeal, which is stored on a DOE webpage and is retrievable by simply searching the keywords “Green Reaper,” establishes why the NNSA need not have produced the record in response to her FOIA request; it is readily available to the public through an alternative form of access. Therefore, the mere existence of the record does not render the NNSA’s search inadequate.

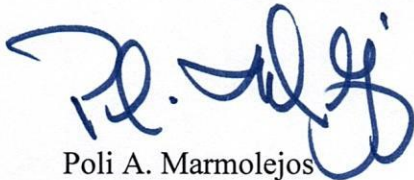
III. Order

It is hereby ordered that the appeal filed by Emma Best on February 6, 2019, No. FIA-19-0003, is denied.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769
Toll-free: 1-877-684-6448



Poli A. Marmolejos
Director
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